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IN THE

Supreme Court of the United States

October Term, 1984

MULTI-STATE COMMUNICATIONS, INC.,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY TO OPPOSITION OF MULTI-STATE COMMUNICATIONS, INC.

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Multi-State Communications, Inc. (Multi-State), petitioner in the above entitled proceeding, pursuant to the provisions of Rule 22.5 of the Rules of the Supreme Court of the United States, hereby respectfully submits its Reply to the Opposition filed on behalf of the Federal Communications Commission and the intervenor, RKO General.

I. JUDICIAL LEGISLATION

The decision of the Court below and the agency directly offend the rule of *Iselin* v. *United States,* 270 U.S. 245, 46 S.Ct. 248 (1926), and other decisions of the court and the circuits as set forth in our Petition (pp. 9-16).

The special emphasis and elaboration imposed on alleged legislative background and history by the Commission and RKO is compelling evidence that Section 331, by its plain terms does not authorize that which the Commission has erroneously done and which the Court below has condoned.

At the risk of repetition, the remarks of legislators or reports of committees, while interesting and perhaps instructive, are not to be accepted as the governing law and may not be made to supply that which has been omitted from the statute.[1]

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[1] The government seeks to suggest that "The legislative history made clear that the statute was intended to allow a licensee that volunteered to move to do so without having to face an immediate comparative hearing" (Brief for FCC in Opposition, pp. 3-4) by referring to remarks made by the sponsor of the bill, Senator Bradley. What the government fails to state, however, is that these remarks were made *after* not before passage and can hardly be correctly proferred as intent of any legislator other than Bradley. Moreover, there is no reference to the misleading statement of Senator Bradley, upon introduction of the bill that "this amendment . . . has been dealt with by the Senate . . . the last time by a vote of 86-4." 128 Cong. Rec. S.8922-23 (daily ed., July 22, 1982). A comparison of the previous amendment to which Senator Bradley made reference and the Section 331 amendment which he proferred clearly reveal fundamental differences. See 127 Cong. Rec. S.11135 (daily ed., October 6, 1981). These differences highlight the omission from Section 331 which the court below and the agency have supplied upon the basis of a selective recitation of background facts. A copy of the previous amendment is included in the appendix. Note that the earlier amendment refers to a State in which no very high frequency television broadcasting station *is operating commercially*. Section 331, however, fails to include "operating commercially."

Confronted by the rule of *Iselin* v. *United States, supra,* upon which we rely ("To supply omissions transcends the judicial function") and with which the decision below conflicts, the opposing parties simply and completely ignore it. It cannot be seriously questioned that courts may not revise an unambiguous statute to fit what it believes was the intent of the legislators.

A review of the labored reasoning of the opposing parties on this point only leads us to say not only that "even Homer nods" but in the words of this court in *United States* v. *Naftalin,* 441 U.S. 768, 773, 99 S.Ct. 2077, 2082:

> "The short answer is that Congress did not write the statute that way."

The government's tortured reasoning as to the allocation of a non-reserved VHF television station to New Jersey (Brief, for the FCC in Opposiiton, pp. 8-9) is not only confusing but also is obviously employed in an attempt to impeach the plain contradictory finding of the Commission itself in ft. n. 2, of its Report and Order in this very case (App. B., p. 21a) wherein the Commission conceded that:

> "An examination of the television allocation table (73.606(b) of the Commission's Rules) shows that Channel 13, a non-reserved, VHF television channel is allocated to New Jersey."

II. DUE PROCESS

Little needs to be added to that which we have set forth in our Petition.

The implications of this case has precedential potential far beyond the narrow reach contended for by the opposition. The critical factor which is side-stepped in both the

FCC and RKO briefs in opposition is the vigorous and expensive pursuit of an administrative application carried on in good faith, on every administrative and judicial level for more than 10 years, long antedating the enactment of Section 331 which neither recognizes nor explicitly deals with its pendency. The Commission's brief does not deign to reconcile its position herein with its administrative recognition that a competing application does achieve a monetary value and, thus, incumbent licensees are permitted to settle the competing claim on the channel with Commission approval.[2] This FCC practice is clearly consistent with the fact that our application, litigated and pressed for more than a decade, has evolved into a species of property entitled to all due process protections of the Fifth Amendment.

The FCC and RKO, allied in their opposition to this petition, have misstated our position when they contend that we claim that the right of any applicant to compete in a comparative hearing under *Ashbacker*[3] is rooted in the Constitution. (RKO Brief in Opp., pp. 14-15; Brief for the FCC in Opp., pp. 10-11). Rather, we clearly contend that such a right once exercised and pressed as long, diligently and expensively, as we have done, in reliance upon existing "rules of the road" thus becomes rooted in the Constitution and acquires constitutional parameters that must not be summarily brushed aside.

It is the difference between a 25-mile marathon race, run under Olympic rules, being cancelled before the competitors commence the race or being summarily cancelled after a competitor – near exhaustion – has the fin-

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[2] E.g., *Hampton Roads Television Corp.*, 46 RR 2d 1547 (1980).

[3] *Ashbacker* v. *FCC*, 316 U.S. 327, 66 S.Ct. 148 (1945).

ish line in sight and victory at hand. Fundamental concepts of due process distinguish the two caes.

This is a case, therefore, affected with a broad and important public interest.

CONCLUSION

The petition for a writ of certiorari or the alternate relief suggested should be granted.

Respectfully submitted,

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APPENDIX

127 Cong. Rec. S.11135 (daily ed., October 6, 1981). That amendment to Section 307 of the Communications Act would have provided in new section (f):

> In order to carry out the intent of subsection (b) of this section, it shall be the policy of the Commission to assign channels for very high frequency television broadcasting in a manner which ensures that not less than one such channel shall be licensed to a commercial station located in each State, if technically feasible. If the Commission at any time on or after January 1, 1980, declines to renew, or revokes, the license of any very high frequency commercial television station whose authorized channel of operation is assigned to a State with more than one such assignment, it shall, if technically feasible, assign such channel to a State in which no very high frequency television broadcasting station is operating commercially.